

E-FILED on 5/23/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re ENTERPRISE BROADCASTING
CORPORATION,

Debtor.

JOHN W. RICHARDSON, Trustee in
Bankruptcy,

Plaintiff,

v.

RICHARD McCUDDEN,

Defendant.

No. C-06-00792 RMW

ORDER GRANTING McCUDDEN'S
MOTION TO WITHDRAW BANKRUPTCY
REFERENCE

[Re Docket Nos. 1, 4, 5]

Richard McCudden moves this court to withdraw the reference of trustee John Richardson's complaint to the bankruptcy court. For the reasons given below, the court grants the motion.

I. BACKGROUND

In June 2003, Enterprise Broadcasting Corporation ("EBC") filed a voluntary petition under Chapter 7, which became Bankruptcy Case No. 03-53622 and was assigned to Judge Arthur Weissbrodt. Richardson became trustee of the bankruptcy estate. Two years later, Richardson

1 filed a complaint against the principals of EBC (Jean Shrader, Don Shrader, and Richard
 2 McCudden) and a backer (Michael Pegram), which became Adversary Proceeding No. 05-05330.
 3 On September 7, 2005, McCudden moved to dismiss the complaint or, in the alternative, for a
 4 more definite statement. On November 8, 2005, there was a hearing before Judge Weissbrodt on
 5 McCudden's motion to dismiss. The next day, McCudden filed a motion to withdraw the
 6 reference to the bankruptcy court.¹ On November 21, 2005, Judge Weissbrodt denied McCudden's
 7 motion to dismiss. On November 28, 2005, McCudden answered the complaint.

8 II. ANALYSIS

9 Title 28 U.S.C. § 157(d) governs withdrawal of matters from the bankruptcy court, and
 10 provides in full:

11 The district court may withdraw, in whole or in part, any case or proceeding
 12 referred under this section, on its own motion or on timely motion of any party, for
 13 cause shown. The district court shall, on timely motion of a party, so withdraw a
 14 proceeding if the court determines that resolution of the proceeding requires
 consideration of both title 11 and other laws of the United States regulating
 organizations or activities affecting interstate commerce.

15 Mandatory withdrawal (the second sentence) is not at issue here, as the torts claims against
 16 McCudden are state-law ones for breach of fiduciary duty and fraud. Permissive withdrawal (the
 17 first sentence) gives district courts the authority to withdraw a reference to the bankruptcy court
 18 "for cause shown" and upon either the district court's own motion (presumably at any time) or
 "timely motion of any party."

19 A. Cause

20 Whether cause exists is a matter generally left to the district court's discretion. *In re*
 21 *Cinematronics*, 916 F.2d 1444, 1451 (9th Cir. 1990). In determining whether cause exists, a
 22 district court should consider: (1) the efficient use of judicial resources; (2) delay and costs to the
 23 parties; (3) uniformity of bankruptcy administration; (4) the prevention of forum shopping; and (5)
 24 other related factors. *Sec. Farms v. Int'l. B'hd of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997).
 25 The delay and cost factor does not strongly favor either result; motions to dismiss have been ruled
 26 upon in the bankruptcy court, but McCudden raises the possibility that he (or another party) might
 27

28 ¹ This motion was, inexplicably, not transmitted to the district court until February 3, 2006.

1 seek review of any bankruptcy court decision before the district court. Nor does efficiency
 2 strongly favor either result at this juncture.² As the claims asserted by Richardson could have
 3 been brought as an original matter in the district court, uniformity of bankruptcy administration is
 4 not endangered by trying those claims here. The court has some concern about forum-shopping;
 5 that McCudden filed his motion to withdraw the reference the day after Judge Weissbrodt heard
 6 McCudden's motion to dismiss suggests that McCudden did not feel argument before Judge
 7 Weissbrodt went well and that McCudden would rather have a different judge decide this matter.
 8 One last factor that should be considered is that McCudden attempted to preserve his right to a
 9 jury trial by including a demand for one in his answer, and that unless he has waived that right by
 10 making an untimely motion to withdraw the reference, withdrawal is mandatory for the non-core
 11 claims³ against McCudden. *See Cinematronics*, 916 F.2d at 1451.

12 **B. Timeliness**

13 Failure to object to the bankruptcy court's jurisdiction in a timely manner constitutes
 14 implied consent to the resolution of the controversy. *See In re Mann*, 907 F.2d 923, 926 (9th Cir.
 15 1990). There is little Ninth Circuit caselaw on what constitutes timeliness under 28 U.S.C.
 16 § 157(d). "A motion to withdraw is timely if it was made as promptly as possible in light of the
 17 developments in the bankruptcy proceeding." *Security Farms*, 124 F.3d at 1007 n.3 (9th Cir.
 18 1997) (internal quotation marks omitted). Another district court granted a motion to withdraw a
 19 reference two months into an adversary proceeding before the bankruptcy court. *See In re*
 20 *Addison*, 240 B.R. 47, 50 (C.D. Cal.1999) (withdrawing reference largely on efficiency grounds).
 21 Given that little has transpired in the bankruptcy court, the court will exercise its discretion to
 22 deem McCudden's motion to withdraw timely.

24
 25 ² Some blame with lack of efficiency at this point lies with McCudden. He did not comply with
 26 Fed.R.Bankr.P. 7012(b)'s requirement that his answer state whether he consented to a bankruptcy
 27 judge entering final judgment on his claims, which has led to the inefficiency of this court
 considering his motion after some proceedings before Judge Weissbrodt. However, it is possible at
 this point that an appeal from the bankruptcy court would result in inefficient, repetitive
 consideration of this matter by both the bankruptcy court and this court.

28 ³ McCudden and Richardson appear to agree that Richardson's claims against McCudden are
 partly core and partly non-core, and the court will assume this to be the case.

1 **C. Scope of withdrawal**

2 All remaining parties⁴ to the adversary proceeding agree that there is substantial overlap
3 between the claims against McCudden and the claims against the Shraders and that it would be
4 wasteful and inefficient to withdraw the reference only as to the claims against McCudden. The
5 court agrees.

6 **III. ORDER**

7 For the foregoing reasons, the court grants McCudden's motion and withdraws the reference
8 to the bankruptcy court of Adversary Proceeding No. 05-05330. The remainder of that action will
9 be handled before this court as Case No. C-06-00792 RMW.

10
11
12 DATED: 5/23/06



RONALD M. WHYTE
United States District Judge

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⁴ Pegram and Richardson have filed a stipulation to dismiss Pegram from the adversary proceeding.

1 **Notice of this document has been electronically sent to:**

2 **Counsel for plaintiff:**

3 Jesse F. Ruiz jfr@robinsonwood.com

4 **Counsel for defendants:**

5 Gary Redenbacher Gary@RedBrownLaw.com
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7 Counsel are responsible for distributing copies of this document to co-counsel that have not
8 registered for e-filing under the court's CM/ECF program.

9 **Copies of this order will be sent to:**

10 The Honorable Arthur S. Weissbrodt
11 United States Bankruptcy Court for the Northern District of California
12 280 South First Street
13 San Jose, CA 95113

14 USBC Manager-San Jose
15 United States Bankruptcy Court for the Northern District of California
16 280 South First Street , Room 3035
17 San Jose, CA 95113

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Dated: 5/23/06 /s/
Chambers of Judge Whyte